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In the Supreme Court of the United States

OCTOBER TERM 1980

GERALD H. SCARPELLI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTION PRESENTED

Whether Petitioner was substantially prejudiced and deprived a fair trial by reason of the trial court's repeated and improper restrictions foisted on defense counsel in his legitimate efforts to cross examine the key State witness against Petitioner in numerous areas of both traditionally legitimate inquiry and crucially relevant inquiry.

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GERALD H. SCARPELLI,

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner Gerald H. Scarpelli prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois for the Second District.

OPINION BELOW

The published opinion of the Appellate Court of Illinois, Second District, is appended to this Petition as Appendix A. The order denying Petitioner leave to appeal to the Supreme Court of Illinois is likewise appended to this Petition as Appendix B.

JURISDICTION

The opinion and judgment of the Appellate Court of Illinois, Second District, was entered on March 28, 1980. The Supreme Court of Illinois denied a timely filed Petition for Leave to Appeal on September 29, 1980. The instant Petition for Writ of Certiorari is filed within sixty (60) days of said denial of the Supreme Court of Illinois. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution are herein involved. The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural Posture.

In the Circuit Court of DuPage County, Illinois, under Cause Nos. 77 CF 296 and 297, the Petitioner Gerald Scarpelli was charged with theft and the possession of burglary tools in violation of Chapter 38, Sec. 16-1(a)-1 and Chapter 38, Section 19-2, of the Illinois Revised Statutes, respectively. On June 9, 1979, this cause came on for trial before the Honorable Carl Henninger and a jury on the above charges. On July 13, 1979, the jury returned a verdict of guilty as charged after over four hours of deliberations, the trial court entering judgment thereon.

Thereafter, sentence was imposed in this cause. Petitioner was sentenced to the custody of the Illinois Department of Corrections for a period of five (5) years for the theft and for a period of three (3) years for the possession of burglary tools, each sentence to run concurrent with the other.

From this judgment and sentence, Petitioner did timely prosecute his appeal with the Appellate Court, Second District. On March 28, 1980, the judgment and order of the Appellate Court, Second District, was returned for publication, affirming the conviction of Petitioner in Cause No. 79-501. Subsequently, notice of intention to file Petition for Rehearing was filed with the Clerk of the Appellate Court. On April 28, 1980, the Appellate Court entered its order denying the aforesaid Petition for Rehearing. Petitioner did then file his Petition for Leave to Appeal to the Supreme Court of Illinois in timely fashion. Ultimately, on October 1, 1980, Petitioner did receive notification by the clerk of the Supreme Court of Illinois that

his Petition for Leave to Appeal in Cause No. 53468 was denied on September 29, 1980. The instant Petition for Writ of Certiorari follows.

B. Statement of Relevant Facts.

For the purposes of the instant petition, the statement of facts advanced by the Appellate Court in its Slip Opinion at pages 1 through 5, which is appended hereto as Appendix A, will be utilized. In order that Petitioner's position with respect to these facts be made salient, it is important to note that on no less than sixty-three occasions during Petitioner's efforts to cross examine the State's key witness, Officer Culen, the prosecution and the trial court amalgamated their efforts improperly to defeat Petitioner from testing the credibility and understanding of this witness with respect to his means of obtaining information, the certainty and source of his purported knowledge, his powers of discernment, his memory and perhaps most importantly his ability to describe the man or men in the parking lot, each of which critical areas was central to a conviction of Petitioner or to Petitioner's acquittal.[1]

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[1] For illustrations from the transcript of these proceedings, see, for example, the record at Pages 413-15; 419-20; 436; 470-74; 482; 484-85; and 489-91.

REASONS FOR GRANTING THE WRIT

The decision of the Appellate Court below, improperly characterizing the obvious error committed by the trial court in its wholesale foreclosure of the legitimate efforts of defense counsel to cross examine the State's key witness as harmless when in fact it was unduly prejudicial, conflicts with Petitioner's right to a fair trial as guaranteed under the Fifth and Sixth Amendment to the United States Constitution.

Petitioner was substantially prejudiced and deprived a fair trial by reason of the trial court's repeated and improper restrictions foisted on Petitioner's counsel in his efforts to cross examine investigating Officer Culen, the only incident witness against Petitioner, in numerous areas of both traditionally legitimate inquiry and crucially relevant inquiry. The foreclosure of cross-examination was so acute and improper as to work an effective denial of Petitioner's constitutional guarantee of confrontation and the effective assistance of counsel as well.

At the outset, it is of critical importance to note that Officer Culen was no mere incidental witness for the State in its case against Petitioner. Rather, as characterized by the panel, Officer Culen was "the State's chief witness". (Appendix A, p. 2). Thus, it was Culen's means of obtaining information, the certainty and source of his purported knowledge, his powers of discernment, his memory and his description of the man or men in the parking lot that were central to a conviction of Petitioner or to Petitioner's acquittal. Yet, on no less than sixty-three occasions during Petitioner's efforts to cross-examine Officer Culen, the prosecution and the trial court amalgamated their efforts im-

properly to defeat Petitioner from testing the credibility and understanding of the principal State witness with respect to each of these critical areas.

The Panel opinion below chose to characterize Petitioner's contentions here as limited to foreclosure of questions calculated to demonstrate prior inconsistent statements of Officer Culen, to foreclosure from examination into whether Culen utilized police reports or conversations with the State's Attorney to refresh his memory, and to preclusion from legitimate inquiry into the precise nature of Culen's recollection regarding the height of the individual Culen saw exit the first vehicle and enter the Monte Carlo. Notably, as to each of these areas, the Panel either outright admits that such foreclosure of cross-examination was error or at least recognizes the probability of error in the alternative. Thus, for example, the Panel at page 11 of Appendix A admits to the commission of error by the trial court in the following fashion:

> "Admittedly, defendant has a right to question an identifying witness regarding any matter which goes to discredit, modify or explain his testimony during direct examination. (citations omitted) Since the nature and credibility of the witnesses' identification is a legitimate area for cross-examination and since such examination should be accorded a wide latitude (citations omitted), it would appear that the trial court erred here by *unduly* restricting defendant's right to cross-examine Officer Culen regarding the officer's identification of the alleged perpetrator of the crime." (Emphasis added)

As such, the Panel correctly notes the undue restriction of Petitioner's Constitutional right to cross-examine Officer Culen, the principal State witness, insofar as his identification of the alleged perpetrator is concerned. Unfor-

tunately, the Panel opinion does not go far enough. In fact, the Panel opinion overlooks numerous additional instances of efforts by Petitioner to cross-examine Culen concerning obviously relevant and material areas of inquiry. The following have been selected to illustrate the point:

(a) The Court on no less than eight occasions foreclosed inquiry into Culen's preparation as a witness, experience on the police force and employment background as irrelevant;

(b) The Court on no less than five occasions foreclosed inquiry into Culen's routine, time assigned to stake-out, success on other stake-outs, and assistance on this stake-out as either irrelevant or immaterial;

(c) The Court on no less than seventeen occasions refused to permit Petitioner to inquire of Culen as to his memory concerning the parking lot in which Petitioner was apprehended, the appearance of the parking lot, the configuration of the vehicles in the parking lot, the volume of vehicular traffic in the parking lot, the volume of pedestrian traffic in the parking lot as either not impeaching, collateral or, with respect to a diagram, "the jury can see for itself";

(d) The Court precluded Petitioner from efforts to impeach Culen as to the number of people who exited the vehicle in question, as to the height of the individual in the parking lot, as to the volume of traffic, as to the position of the individual in the car, as to the absence of critical facts in his police report, as to the chase through the parking lot, and as to the arrest as not impeaching or collateral; and

(e) The Court precluded Petitioner from bringing out important facts concerning observations of Culen made just prior to the arrest, concerning the color of the vehicle in question, concerning the failure to run license checks of other vehicles, concerning the identity

> of the package alleged to contain burglar tools, and concerning the purported display of Culen's badge as irrelevant.

The foregoing illustrations amply portray the courtroom scenario of repeated interposing of improper objections by the State's Attorney to questions propounded by Petitioner to Culen on cross-examination, and the concomitant improper sustaining of those objections by the trial court extending to virtually every legitimate area of cross-examination and resulting in the complete emasculation of this fundamental constitutional right. Of critical import, in this context, is the fact that Petitioner presented a clear and consistent innocent explanation for his activity, corroborated by three people, two of whom had never before met Petitioner. Notwithstanding this, it was the Panel's conclusion that this pattern of admitted error of Constitutional dimension was "harmless". The law in this area and the facts of this particular case plainly militate against this conclusion and require that the instantly sought petition be granted.

The proper legal guide to be utilized in determining whether admittedly improper restrictions on cross-examination constitute harmless error has been articulated as follows:

> ". . . Before a federal constitutional error (foreclosure of cross-examination) can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 368 U.S. 18, 24, 17 L.Ed.2d 705, 710-11, 87 S.Ct. 824.

See also, *Harrington* v. *California,* 359 U.S. 250, 251, 23 L.Ed.2d 284, 286, 89 S.Ct. 1726 (1969); see, generally, *Milton* v. *Wainwright,* 407 U.S. 371, 372, 33 L.Ed.2d 1, 4, 92 S.Ct. 2174 (1972).

Subsequent to *Chapman, supra*, this Court elaborated on the Constitutional harmless error standard in *Schneble* v. *Florida*, 405 U.S. 427, 430, 31 L.Ed.2d 340, 344, 92 S.Ct. 1056 (1972), in explicating that only where the "admitted evidence of guilt is so overwhelming, and the prejudicial effect of the (erroneously foreclosed examination) is so insignificant by comparison, that it is clear beyond a reasonable doubt" that the error did not contribute to the conviction will a new trial not be afforded. In the instant case, for the Panel to have found the error committed by the trial court harmless reveals a clear misapprehension of the nature of the case against Petitioner. It strains credulity to find the error harmless under these circumstances where the numerous precluded questions to the critical witness were so fundamental and where the evidence against Petitioner was not so overwhelming, and in fact was weak.

In this case, Petitioner's version of the events just prior to his arrest was highly plausible and his testimony was clear and consistent. Simply stated, Petitioner was present at the bowling alley premises, there intending to have a drink while awaiting a ride home. There was nothing inherently unusual about having a drink on these bowling alley premises, certainly during early to mid-evening hours. Petitioner was sidetracked from his drink, however, when he heard a car start up and turned to see what appeared to be its driver slumped over in his seat. Petitioner merely walked over to the car to discern the problem, if any, and was, at that time, confronted by a man dressed in blue jeans and a sweater pointing a gun directly at him. To this extent, the evidence is uncontradicted as there is no question but that Officer Culen, the

man who confronted Petitioner, was dressed in plain clothes and had his gun drawn.

Two other individuals, who happened to be in the parking lot at that particular time, corroborated Petitioners testimony, explaining at trial under oath how they happened to see a man standing next to a vehicle and a second man, standing not too far away, pointing a gun at the first man. This of course as to the first man, would be Petitioner, and as to the second man, would be Officer Culen in plain clothes. What is most interesting about the testimony of these two additional individuals, William Congleton and Linda McCormick, is that they had no connection to Petitioner whatsoever prior to his arrest and their testimony at trial was unimpeached.

The most salient aspect to these two corroborative witnesses is the fact that they observed the third man exit the car which Petitioner had been standing next to, and further observed this third individual run in the opposite direction of the first two men. Thus, the testimony of Petitioner, which standing by itself presents strong evidence of innocence, was corroborated in significant respects by the testimony of two disinterested and unimpeached witnesses.

A third and final witness, a companion of Petitioner, Karen Garcia, testified that she had dropped Petitioner at the bowling alley so that he could have something to drink while she stopped at a nearby store to shop. As such, all aspects of Petitioner's testimony were corroborated. Certainly, the Appellate Court must have misapprehended the fair import of the testimony of these witnesses in order to have found the trial error "harmless." At the very least, this defense testimony plainly raises sufficient doubt to obviate any finding of harmless-

ness in connection with the foreclosure of cross-examination.[2]

It is against this backdrop of a strong case presented by the defense that the undue restriction of the cross-examination of Officer Culen must be viewed. It bears repeating that Culen was no mere incidental or buttressing witness. Rather, Culen was *the* chief witness for the State, upon whose testimony the entire case against Petitioner hinged. Culen was the sole occurrence witness against Petitioner testifying for the State who actually identified Petitioner as the perpetrator of the alleged offenses. With respect to the balance of the State's case, Petitioner was merely demonstrated to be present at the scene.

Under circumstances such as these, where a critical State witness is concerned, there are no known cases which have upheld the complete denial of access into several areas otherwise properly the subject of cross-examination.[3] Thus, while it appears from the Panel decision that the Appellate Court at least articulated the status of Culen as "the State's chief witness," (Slip Op. p. 1, App. p. 2), it

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[2] In the argument which follows under Subsection C, *infra*, Petitioner further contends that such testimony, even when viewed in a light most favorable to the State, casts a reasonable doubt on the guilt of Petitioner as to both charges, warranting reversal.

[3] There are, on the other hand, numerous cases in which various courts, having been confronted with improper limitations on cross-examination of not near the magnitude as contained in this case, could not consider the error harmless and, in fact, reversed. See, e.g., *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Alford* v. *United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931); *United States* v. *Jackson*, 482 F.2d 1167 (10 Cir.), *cert. den.* 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111 (1973).

remains in the context of this case that the Panel paid no more than lip service to that status.

What greatly exacerbates the far less than overwhelming nature of the case against Petitioner and the fact that it was the crucial witness involved in the foreclosure of cross-examination is the nature of the questions which were in fact foreclosed by the trial court. Witness for example the fact that Petitioner was precluded on not less than five occasions from inquiring of Culen as to the number of people who exited the subject vehicle. As there was a genuine issue of fact as to whether a third individual, other than Petitioner, actually exited the subject vehicle, this inquiry was critical. Unbelievably, in this context, the trial court found such inquiry to be "collateral." What is more, Petitioner was precluded of inquiring of Culen as to the volume of pedestrian traffic during these events. Thus, the jury was, in turn, precluded from finding out whether it was reasonable under the circumstances for Culen to have missed seeing the third man. An additional exacerbating circumstance is the fact that the trial court on at least five occasions refused to allow Petitioner to inquire of Culen as to the height of the man in the lot that he first observed as compared with the height of Petitioner. The trial court found this again to be "collateral" and further stated "the jury can see."[4]

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[4] This comment by the trial court reflects a gross misunderstanding of what it was Petitioner attempted to accomplish through cross-examination of Culen. It was Petitioner's efforts to demonstrate a variance between the description Culen provided of the individual he initially observed in the lot that evening and the actual description of Petitioner. Petitioner was not simply trying to obtain Culen's on-the-stand assessment of his current description although this, too, would be permissible to test Culen's powers of discernment. By the commentary "the jury can see," the trial court completely foreclosed a critical area of inquiry to Petitioner. More importantly, the trial court may well have misguided the jury away from Petitioner's theory of the defense, thereby seriously prejudicing Petitioner.

While the Panel admits that this is error, it incredibly stands steadfast to the characterization that it is harmless.

Highlighting the error in the court's undue limitations on cross-examination and the concomitant failure of the Panel to recognize this as prejudicial is the fact that the particular officer in question, Culen, was an officer, at the time of the arrest of Petitioner, of comparatively little experience. Yet the trial court never allowed Petitioner, despite his persistent efforts, to inquire of Culen the extent to which he prepared as a witness, the extent of his employment background, his experience on the force, his success in other stakeouts, or the extent to which he reviewed his *own* report or discussed the matter with the State's Attorney. Since it was Culen's observations which were critical to Petitioner's conviction or acquittal, not only were these questions traditionally legitimate but, in the context of this particular case, central to Petitioner's theory of defense. Precluding the same in effect denied Petitioner effective cross-examination of Culen and cannot possibly be deemed harmless.

Moreover, the trial court improperly precluded Petitioner from exploring Culen's general courtroom experience or lack thereof, the validity of his present memory or lack thereof, and whether Culen recently used police reports or conversations with the State's Attorney to refresh his memory. As the Panel conceded, the instant record plainly bespeaks the error in foreclosing inquiry into these traditionally legitimate areas of inquiry:

> "BY MR. GENSON: Well, you—prior to testifying today—you have testified in courtrooms before today, have you not?
>
> MR. BART: Objection.
>
> THE COURT: Sustained.

MR. GENSON: Your Honor, this is regarding the experience of the police officer in regard to testifying.

THE COURT: I ruled on the objection. Sustained.

MR. GENSON: You have, prior to testifying today, read reports on this matter, had you not?

MR. BART: Objection.

THE COURT: Sustained." (R. 413-414)

The Court and prosecutor continued in the same vein to prevent Petitioner from questioning Culen on these critical areas:

"MR. GENSON: And prior to having the conversations—with regard to the conversations with the State's Attorney, you were furnished certain reports and preliminary hearings to read, were you not?

A. The reports I was furnished to read were the reports written by myself, sir.

Q. That's what I'm talking about. And you have read them; is that correct?

MR. BART: Objection.

THE COURT: The objection is sustained. Are you trying to impeach the witness? I don't understand what it is you are trying to do at this point.

MR. GENSON: In regard to the preparation of the witnesses. This is a long time ago and with regards to—it is a proper inquiry and has always been with regard to his preparation before testifying.

THE COURT: Objection is sustained. The jury is instructed to disregard the statement made by counsel.

MR. GENSON: In any event, though, how often or how many times did you prepare or talk to the State's Attorney prior to the testimony in this case?

MR. BART: Objection.

THE COURT: Sustained." (R. 415)

The Panel, as noted above, correctly ruled that "the practice of inquiring on cross-examination in the criminal case, as to whether, and under what circumstances and with whom a witness has discussed the facts of the case is a standard question. Such questions are generally approved." (See Slip Op., at p. 10, App. p. 10)[5] However, the Panel most improperly concluded "that the exclusion of this testimony" could not have contributed to the conviction of Petitioner. In reaching this conclusion, the Panel engaged in just the sort of improper speculation as to what in fact Culen's testimony may have been that was absolutely proscribed by the Seventh Circuit in the very recent decision of *Allison* v. *Gray,* 603 F.2d 633 (1979). The *Allison* Court put to rest once and for all the impermissible speculation into which the Panel delved in its opinion.

In *Allison* v. *State of Wisconsin,* 214 N.W.2d 437, (1974), the Supreme Court of Wisconsin held it to be harmless error where the defendant was precluded from presenting alibi witnesses because of his failure to comply with the Wisconsin notice-of-alibi statute. The United States District Court for the Eastern District of Wisconsin agreed and denied a writ of habeas corpus, but on appeal the Seventh Circuit reversed (*Allison* v. *Gray, supra*), in language which directly rejects the position taken by the Appellate Court in its Panel opinion as follows:

> "As Allison points out in his brief, if his alibi witness had been the keeper of records at the Wisconsin State prison who should have testified that Allison was released from prison the day after the crime occurred, the exclusion of such evidence could hardly be deemed harmless, despite the evidence against Allison. Since there is nothing in the record to show that

[5] In fact, this is the first reported case known to Petitioner wherein a trial court actually foreclosed inquiry on cross-examination of the State's principal witness on these areas.

> Allison's alibi was not equally compelling, the State has not met its burden under *Chapman* of proving that the erroneous exclusion of the alibi is harmless beyond a reasonable doubt." (603 F.2d at 635)

Accordingly, *Allison* effectively destroys the reasoning advanced by the Panel opinion in the case at bar. Quite simply, the court cannot say that the exclusion of the Culen testimony could not have contributed to the conviction of Petitioner where the Court, or for that matter anyone else, did not know what the testimony would have been. Thus, for example, if Culen had responded that the State's Attorney and he had discussed the matter on numerous occasions, and, as a result thereof, he decided to change his testimony from seeing someone other than Petitioner behind the wheel of the Monte Carlo originally, the exclusion of such evidence could hardly be deemed harmless, despite the evidence against Petitioner.

Likewise, the *Allison* decision has significant ramifications with reference to the trial court's obvious interference with Petitioner's right to question Culen concerning the identification of the individual near the Monte Carlo. The following colloquy illustrates the point:

> "MR. GENSON: How tall was the man you saw get out of the car, sir?
>
> A. (Culen): From the distance I was, I could tell he wasn't overwhelmingly large, because of the amount of his head sticking up from above the vehicles.
>
> Q. Could you estimate how tall he was?
>
> A. I would definitely say he wasn't any taller than myself.
>
> Q. How tall are you?
>
> A. Five foot nine inches tall.

Q. Well, was the man then five foot nine inches tall?

MR. BART: Objection.

THE COURT: Sustained.

MR. GENSON: At the preliminary hearing, page 15, did you say that the person was between five foot six inches tall and five foot ten inches tall?

MR. BART: Objection.

THE COURT: Sustained.

MR. GENSON: At the preliminary hearing, you did not know, within four inches, how tall the man was, did you?

MR. BART: Objection.

THE COURT: That's sustained. If you ask another question, I'm going to hold you in contempt of court, for I have sustained an objection.

MR. GENSON: I will make an offer of proof again, Judge.

THE COURT: The objection is sustained. The jury is instructed to disregard it. It's an attempt by counsel to impeach on collateral matters and that's improper. Proceed." (R. 489-491)

Assuming for the sake of argument that the prejudicial impact of this forclosure and the concomitant uncalled for remarks of the trial court are not self-evident,[6] then at

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[6] There is perhaps no more telling illustration of the prejudicial effect of the trial court's actions than here, where *the trial court went so far as to threaten defense counsel with contempt if he persisted in the admittedly proper questioning of the chief State eyewitness about the physical characteristics of the perpetrator of the offense where the theory of the defense was that a third individual, seen by two bystanders, was the actual perpetrator.*

least the Panel should not have been free to speculate that the exclusion of what Culen may have testified to was harmless. If for example, Culen was permitted to testify as he should have been and did testify that the man he saw get out of the Monte Carlo was six feet tall, or even five foot ten inches tall and two hundred pounds, certainly the exclusion of such evidence could hardly be deemed harmless, again despite the evidence against Petitioner.

Allison is again instructive with regard to the Court's improper restriction of the scope of cross-examination concerning the license number checks on other vehicles in the parking lot. (R. 422) Such inquiry was critical to the defense as there were at least three vehicles involved at the scene of Petitioner's arrest, supporting Petitioner's theory that a second individual other than Petitioner was the culpable party. As Petitioner was precluded from inquiring of Culen as to the results of any license checks which may have been conducted, the Panel erred in assuming that the results of such checks would have been fruitless. In this regard, it is important to emphasize that the burden is *not* on the defense to prove—or offer to prove—the anticipated testimony; rather, the burden rests with the State to demonstrate beyond a reasonable doubt its harmlessness. Absolutely no such demonstration has been made in this case and the Panel is left to speculate erroneously that the preclusion was "harmless."

While the record is replete with instances in which the scope of cross-examination was improperly restricted, one final *Allison*-type illustration bears specific mention. At trial, Culen was questioned about the location of the gun he drew upon Petitioner at their initial confrontation. This testimony differs substantially from Culen's earlier statements and was at variance with the testimony of two eye-

witnesses presented by the defense. (R. 499-500) This line of inquiry was essential to the substantive issue of Petitioner's state of mind, causing him to flee. Depending on the precise circumstances under which Culen drew his gun, Petitioner's flight from the scene may have appeared quite reasonable. In this instance, on a dark winter evening, an individual dressed in jeans drew a gun and pointed it at Petitioner. While the ordinary reaction of some would be to freeze in fear, others may instinctively run. Yet the trial court erroneously foreclosed Petitioner from this line of inquiry. It is simply not proper under the case law to assume the exclusion of Culen's testimony was harmless where there was no way of knowing what he would have said; and this particularly in light of the fact that the State had the burden of showing harmlessness beyond a reasonable doubt.

Finally, and by way of a summary, Petitioner invites the attention of the Court to the decision in *Smith* v. *State of Illinois,* 390 U.S. 129, 89 S.Ct. 748, 19 L.Ed.2d 956 (1968). The *Smith* decision is something of a compendium of the several factors important to a just resolution of the instant issue. First *Smith* makes clear that the essence of a fair trial is that reasonably wide latitude be given to a cross-examiner, even where he is unable to state to the court what facts a reasonable cross-examination might develop. Thus, in this case, foreclosure of the numerous areas of traditionally legitimate inquiry alone warrants reversal. Further, *Smith* defines for reviewing courts just when prejudice emerges in the denial of cross-examination. In *Smith,* the Court found prejudice to ensue from the denial to the cross-examiner of an opportunity to place the witness in his proper setting and put the witness' credibility to a test, without which no jury could fairly appraise the witness. Here, unquestionably, Petitioner

was precluded from just such opportunity. Additionally, *Smith* is noteworthy for the way in which it highlights the care courts have taken in protecting so fundamental a constitutional right as cross-examination. In *Smith,* the bare fact that the cross-examiner was precluded from asking the State informer, "Where do you live?" was deemed prejudicial, warranting reversal. Here, the length and breadth of foreclosure of cross-examination dwarfs that which was condemned in *Smith.* Furthermore, *Smith,* like this case, involved the testimony of a "principal" prosecution witness. Finally, *Smith* reiterates the very fundamental obligation imposed on a trial court, apparently overlooked in this case, to see that a defendant is given a fair trial, and not to protect a witness from being discredited on cross-examination as it seemed the trial court attempted to do here.[7]

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[7] For one of the many examples, see the record at page 422, wherein the trial court, after sustaining an objection to a legitimate question propounded by a defense counsel on cross-examination, stated: "The issue here is whether or not the defendant committed the offense he's charged with. This officer is not on trial." Evidently, the trial court conceived of his chief function as being the protector of the dignity of the officer-witness, rather than insuring that the Petitioner was afforded a fair trial.

Of additional interest in this context is the fact that the prosecution never provided any reason for its consistent pattern of otherwise improper objections. Whatever the reasons, the result was the undue interference with the effective cross-examination of the State's key witness.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be allowed to review the instant decision of the Appellate Court of Illinois for the Second District.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 79-501

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

GERALD H. SCARPELLI,
Defendant-Appellant.

Appeal from the Circuit Court for the 18th Judicial Circuit,
DuPage County, Illinois.

Filed March 28, 1980

MR. JUSTICE VAN DEUSEN delivered the opinion of the court:

The defendant was found guilty by a jury of the offenses of theft in excess of $150 and possession of burglary tools. For offense of theft in excess of $150 he was sentenced to the Illinois Department of Corrections for a term of 5 years and fined $10,000; for the offense of possession of burglarly tools he was sentenced to a minimum term of 1 year and a maximum term of 3 years. The sentences were to run concurrently. Defendant now appeals his convictions.

At trial, conflicting versions were presented regarding the events that transpired on the evening of February 8, 1977. Officer Culen, a Willowbrook police officer and the State's chief witness, testified to the following facts. At approximately 7 p.m. on this particular evening Officer Culen was sitting in his own car in a residential driveway located across the road from the Willowbrook Bowling Alley parking lot. The officer was not in uniform and was engaged in a stake out of the parking lot because a number of car thefts had recently occurred there between the hours of 7 p.m. and 10 p.m. During these particular hours bowling leagues were conducted at the bowling alley. It was a clear night, and the officer had an unobstructed view of the parking lot, which was illuminated by large vapor lights.

About 8 p.m. the officer, with the aid of binoculars, observed a vehicle enter the lot and drive slowly up and down several aisles or rows, past a number of empty parking spaces in each row. The vehicle stopped at the end of an aisle near the road and close to the officer's location, and two people stepped from the car and were observed to clean the windshield or lights. Both individuals returned to the car, and one of them picked up a small black bag or case from the car and emerged carrying it pressed against his stomach. Officer Culen further testified that he observed this individual walk down a row about three or four stalls to a 1975 Chevrolet Monte Carlo, which was located under one of the lot's vapor lights. As this person approached the Monte Carlo, Officer Culen radioed for assistance since he believed that he had an auto theft in progress. As he saw the individual approach the Monte Carlo, he started his vehicle still keeping his eyes on the individual. He observed the person enter the Monte Carlo from the driver's side and saw the interior lights of the vehicle come on. He saw no other pedestrian traffic at

this time in the area. The officer then proceeded to drive his car to the area of the Monte Carlo. He then noticed exhaust smoke coming from the Monte Carlo, and as he continued to approach slowly, he observed back up lights and saw the Monte Carlo start to back up. He then stopped his car directly behind the Monte Carlo and exited his car. As he did so, he grabbed his wallet and badge case in his left hand and had his pistol in his right hand. At this time, the individual was still in the car with the door closed. The individual in the car opened the door on the driver's side and looked at the officer. The officer held out his badge, at shoulder height, with his gun at his side and called out "Police officer, freeze or halt." At this point, approximately 15 feet separated the officer from the individual in question. The individual then exited the vehicle from the driver's side and ran in a westerly direction. He was pursued by Officer Culen who kept him within his sight and within a distance of 20 feet until he was apprehended. He did not see anyone else in the Monte Carlo as he passed it in pursuit.

The officer also testified that the clothing description and basic size and hair of the individual who exited the first vehicle and entered the second vehicle (the Monte Carlo), fit the defendant. He also identified the defendant in open court as the person who was in the 1975 Monte Carlo.

Officer Culen then testified to running a records check of the subject vehicle, which revealed that Mr. Frank Panoch was the registered owner of the Monte Carlo. Shortly thereafter, an unidentified man approached him in the parking lot and while looking at the 1975 Monte Carlo said to him "What the hell is my car doing running", and "That is my car." Officer Culen as well as Sergeant Dusek, who had responded to the call for assistance, testi-

fied that a subsequent search of the 1975 Monte Carlo revealed an open black bag with a small flashlight that was still on, a pair of vice grips, a lock pulling device, a screwdriver, a pair of pointed pliers, an ignition locking device and a wrench. These items were introduced as evidence during trial.

Mr. Frank Panoch testified at trial. He had been bowling at the Willowbrook Bowling Alley on the evening in question, and as he was walking across the bowling alley parking lot toward his car he noticed some commotion near his vehicle. He then observed his 1975 Monte Carlo with its engine running and its lights on. A police officer told him to return to the bowling alley where he would be contacted later by the police. The police impounded his car that evening, and he obtained release of the vehicle from the Willowbrook police department two days later. In addition, he had not authorized anyone to use his car on the evening in question. Mr. Panoch had purchased the car in December 1974 for $5,900, and the vehicle was still in good condition on the evening of the incident.

Defendant, Gerald Scarpelli, testified in his own behalf that Karen Garcia and he were together that evening and that she dropped him off at the bowling alley so that he could have something to drink while she shopped at a nearby store. Karen Garcia's testimony is in agreement with that of the defendant on this point. Defendant further testified that as he was walking across the parking lot he heard a nearby vehicle start its engine and that when he turned to look at this vehicle he noticed that the driver apparently had fallen over in the car. Defendant then began to walk toward the car, and when he got next to it he saw another man standing on the other side of the subject vehicle pointing a gun at him. Continuing, defendant testi-

fied that he did not know that the man with the gun was a police officer, since he was dressed in blue jeans and a sweater and had not identified himself to the defendant. Out of fear for his life, defendant immediately ran through the parking lot and away from the man with the gun.

Two defense witnesses, William Congleton and Linda McCormick, testified that they were in the same parking lot on the evening in question. Mr. Congleton testified that he saw two men initially; that one man had something in his hand which looked "an awful lot like a gun" and that it appeared that he was pointing the gun toward another man; and that both men ran away from the parking lot, the one with the weapon chasing the other. Ms. McCormick testified in a similar vein, except she said she "assumed" what the person had in his hand was a gun. She did not testify as to whether the gun was pointed at anyone. Both witnesses further testified that they observed a third man in the area after the other two men ran elsewhere and that the third man exited the subject vehicle and ran in the opposite direction of the other two.

On appeal, the defendant contends that his petition for substitution of judges as well as his motion to quash his arrest and suppress evidence were erroneously denied, that he was substantially prejudiced and deprived of a fair trial by improper restrictions imposed upon his right to cross-examine State's witnesses, and that the verdict of the jury was palpably erroneous.

On May 27, 1977, the defendant filed a petition for "change of venue" pursuant to section 1 of "An Act to revise the law in relation to change of venue" (Ill. Rev. Stat. 1973, ch. 146, par. 1) before the trial judge to whom the case had been assigned, naming two judges who were prejudiced against him. This motion was treated as an

automatic motion for substitution of judges provided for in section 114-5(a) of the Code of Criminal Procedure (Ill. Rev. Stat. 1975, ch. 33, par. 114-5(a)), and the cause was immediately assigned to and placed on the trial call of a third judge. Thereafter the cause came on for trial on July 9, 1979. The third judge, being otherwise engaged on that day, transferred the cause to a fourth judge for trial. Defendant immediately filed a motion for substitution of judges pursuant to section 114-5(a) of the Criminal Code. The defendant did not move for substitution of judges for cause as provided for under section 114-5(c) of the Criminal Code (Ill. Rev. Stat. 1975, ch. 33, par. 114-5 (c).) The court, stating that the defendant had exhausted his rights for such a substitution as a result of the court's having granted his earlier petition, denied the motion.

Illinois case law interpreting section 114-5(a) clearly holds that the section allows only one automatic substitution of judges. (*People ex rel. Walker* v. *Pate* (1973), 53 Ill. 2d 435, 506-507; *People* v. *Davis* (1977), 54 Ill. App. 3d 517, 524; *In re Stiff* (1975), 32 Ill. App. 3d 971, 974.) The motion for a substitution of judges was properly denied.

Defendant next contends that his motion to quash and suppress should have been granted because the arresting officer did not have probable cause or reasonable grounds to make a warrantless arrest. With respect to warrantless arrests, the federal and state constitutional requirement of probable cause (U.S. Const., amend. IV; Ill. Const. 1970, art. 1 §6) and the state statutory standard of reasonable grounds (Ill. Rev. Stat. 1977, ch. 38, par. 107-2(c)) are synonymous. (*People* v. *Wright* (1974), 56 Ill. 2d 523, 528; *People* v. *Lawson* (1976), 36 Ill. App. 3d 767, 770.) Both parties agree that reasonable grounds or probable cause jutisfying a warrantless arrest exist where the facts and circumstances within the arresting officer's knowledge

are sufficient to justify a man of reasonable caution in believing that a person is committing or has committed an offense. *People* v. *Wright; People* v. *Lower* (1955), 55 Ill. App. 3d 1014, 1019, *cert. denied* (1973), 439 U.S. 358, 58 L. Ed. 2d 166, 99 S. Ct. 174; *People* v. *Denwiddle* (1977), 50 Ill. App. 3d 134, 189; Ill. Rev. Stat. 1977, ch. 38, par. 107-2(c).

Since police officers are subject to a variety of suspicious events and circumstances during the course of their duties, it is not possible to state a general rule regarding what information satisfies the constitutional and statutory probable cause requirements in the area of warrantless arrest. Each case is governed by its own particular facts and circumstances. (*People* v. *Clay* (1973), 55 Ill. 2d 501, 504-505; *People* v. *Doss* (1970), 44 Ill. 2d 541, 546; *People* v. *McCrimmon* (1967), 37 Ill. 2d 40, 43, *cert. denied* (1967), 389 U.S. 863, 19 L. Ed. 2d 131, 88 S. Ct. 120.) Some additional guidelines, however, have been established. The facts upon which probable cause to arrest is based need not be sufficient to convict (*People* v. *Williams* (1978), 62 Ill. App. 3d 874, 877), but something more than a hunch or mere suspicion is required (*People* v. *McGowan* (1977), 69 Ill. 2d 73, 77-78, *cert. denied* (1978), 435 U.S. 975, 56 L. Ed. 2d 69, 93 S. Ct. 1624; *People* v. *McCrimmon*, at 43).

Defendant contends that he was under arrest the moment the officer told him to halt or freeze, and that at this particular time the officer did not have reasonable grounds or probable cause to arrest him. His position regarding the moment of arrest is erroneous. A police officer's identifying himself as such and ordering the subject to stop does not necessarily constitute an arrest. (*People* v. *Beall* (1976), 42 Ill. App. 3d 452, 456.) In fact, an arrest is made by an actual restraint of the person or by that person's submission to police custody. (*People* v. *Ruffolo*

(1978), 64 Ill. App. 3d 151, 156; *People* v. *Guhlstorf* (1978), 56 Ill. App. 3d 381, 383; *People* v. *Lawson,* at 771; Ill. Rev. Stat. 1977, ch. 38, par. 107-5(a).) Since the defendant fled upon being confronted by the officer, he was not under actual restraint of his person nor did he submit to custody at that time. The defendant's arrest occurred when he was captured by the police following a chase which immediately ensued.

Section 107-14 of the Code of Criminal Procedure (Ill. Rev. Stat. 1977, ch. 38, par. 107-14) provides that a police officer, after having identified himself as such, may stop any person for purposes of investigating criminal behavior "* * * when the officer reasonably infers from the circumstances * * *" that criminality is afoot. The requirements for making an investigatory stop of a subject under the above statute are less than those required for making an arrest. (*People* v. *McGowan,* at 77-78; *People* v. *Kennedy* (1978), 66 Ill. App. 3d 267, 272; *People* v. *Garza* (1976), 44 Ill. App. 3d 30, 33; *People* v. *Hellemeyer* (1975), 28 Ill. App. 3d 491, 495.) The officer's decision to investigate possible criminal behavior must be based on specific and articulable facts which, when combined with rational inferences from those facts, reasonably warrant the investigative intrusion. *People* v. *Lee* (1979), 69 Ill. App. 3d 756, 758; *People* v. *Gunderson* (1978), 66 Ill. App. 3d 516, 522; *People* v. *Montgomery* (1977), 53 Ill. App. 3d 298, 301-302; *People* v. *Hellemeyer,* at 495.

In reaching its decision, the trial court found that a combination of all of the facts and circumstances known to the officer at the time of the arrest supported a reason to believe on his part that the defendant was committing a crime on the evening in question. We agree with this finding.

The trial court pointed out that car thefts had previously occurred in the bowling alley parking lot and the investigating officer was well aware of this pattern of crime and as a matter of fact was on a stake out. The bowling leagues were in mid-progress on the night of the incident. There was very little activity in the parking lot at the time; the vehicle which entered the parking lot drove up and down the various rows of cars, passing a number of vacant parking spaces in each row; the officer observed the subject carrying a black bag, which did not appear to be a bowling bag, against his stomach; the officer saw the subject enter a vehicle which was parked some distance from the subject's own car; the officer observed exhaust fumes coming from the car which the subject had entered; and he saw the car start to move, at which time he blocked the same vehicle with his own car. At that time he exited his car, with his badge in one hand and his pistol in the other, and called out "Police officer, freeze or halt."

In light of the facts and circumstances of this case as outlined and discussed above, the officer's decision to stop the vehicle in order to maintain the status quo while he investigated for criminal activity was based on more than a mere hunch, and there were sufficient articulable facts from which he could reasonably infer from the circumstances that criminality was afoot. If there be any question that the officer did not have probable cause to arrest defendant at the time of the initial stop, the added factor of the defendant's flight from the police officer, who had identified himself as such, is sufficient to justify a belief by a person of reasonable caution that the defendant was committing or had committed an offense. (*People* v. *Addison* (1977), 56 Ill. App. 3d 92, 98; *People* v. *Beall,* at 457; *People* v. *Cribbs* (1972), 8 Ill. App. 3d 750, 753; *People* v. *Staples* (1971), 1 Ill. App. 3d 922, 926.) The requisite de-

gree of probable cause to arrest did exist under the facts and circumstances of this case, and the motion to quash and suppress was properly denied.

Another ground upon which defendant seeks reversal is that he was substantially prejudiced and deprived of a fair trial by the trial court's restriction of his cross-examination of the investigating officer in areas of inquiry which the defendant labels as traditionally legitimate. Generally, defendant's main contentions here are that the trial court sustained objections to questions intended to test the credibility of Officer Culen, prevented the defendant from exploring whether the officer had utilized police reports or had had conversations with the State's Attorney to refresh his memory, and restricted his inquiry into the credibility of the officer's identification of the defendant.

We have carefully reviewed all of these areas of proposed inquiry. More specifically, with reference to the alleged prior inconsistent statements, the judge's ruling were correct, since either no inconsistency was shown or the question dealt with an immaterial matter. However, even if the rulings were erroneous, the variance was so slight that the exclusion constituted no more than harmless error.

The trial court also prevented defendant from examining the officer regarding whether the officer had utilized police reports or had had conversation with the State's Attorney to refresh his memory. The practice of inquiring on cross-examination in a criminal case, as to whether, and under what circumstances and with whom a witness has discussed the facts of the case is a standard question. Such questions are generally approved. (See *People* v. *Davis* (1970), 126 Ill. App. 2d 114, 118; *West Chicago Street R.R. Co.* v. *Byrne* (1899), 85 Ill. App. 488; Annot,

35 A.L.R. 2d 1045 (1954).) Even if the trial court erred in not allowing the cross-examination here, the error is harmless unless a reasonable doubt exists that the restriction of the cross-examination of Officer Culen could have contributed to the defendant's conviction. (*People* v. *Rehbein* (1977), 54 Ill. App. 3d 93, 100, *aff'd* (1978), 74 Ill. 2d 435; *People* v. *Lewis* (1974), 18 Ill. App. 3d 281, 285.) Since we conclude that no reasonable doubt exists that the exclusion of this testimony could have contributed to the conviction of the defendant, any error resulting from its exclusion was harmless.

Defendant also contends that he was precluded from legitimate inquiry into the precise nature of Officer Culen's recollection regarding the height of the individual he saw exit the first vehicle and enter the Monte Carlo. Admittedly, defendant has a right to question an identifying witness regarding any matter which goes to discredit, modify or explain his testimony during direct examination. (*People* v. *Morris* (1964), 30 Ill. 2d 406, 409; *People* v. *Lewis,* at 284.) Since the nature and credibility of a witness's identification is a legitimate area for cross-examination and since such examination should be accorded a wide latitude (*People* v. *Lewis*), it would appear that the trial court erred here by unduly restricting defendant's right to cross-examine Officer Culen regarding the officer's identification of the alleged perpetrator of the crime. However, again in the totality of the circumstances shown by the evidence in this case, such error could not possibly be of such magnitude as to require reversal. The alleged inconsistent statement of the officer which was not admitted dealt with a slight discrepancy in the height of the alleged offender. It should also be kept in mind that this is not a case where the defendant was apprehended some time later on the basis of a description based on clothing, height and size. The investigating officer testified

that he saw the individual walk from the first car to the Monte Carlo, enter the Monte Carlo on the driver's side, and that he actually watched this individual exit the car and flee upon confrontation with the officer. The officer was within 20 feet of him at all times during the flight, and he was at all times within sight and within 20 feet of the officer until apprehended. Again, in light of the totality of the circumstances in this case, we determine that no reasonable doubt exists that the restriction of the defendant's cross-examination in this area could have influenced the jury's determination of guilt. Hence, the error was harmless.

We also have considered the argument of defendant that it was the total or cumulative effect of the restrictions of the trial judge in these areas of cross-examination which denied him his fair trial. The law in Illinois is that even where the trial judge has committed error, such error will not require reversal unless the defendant has been prejudiced or the outcome of the trial unduly influenced. Appellate court review is intended to seek out prejudicial error and is not intended to determine whether the record is totally devoid of error. (*People* v. *Mathis* (1977), 55 Ill. App. 3d 680, 688.) Although the trial court here may have committed error on a few occasions in restricting defendant's cross-examination of the investigating officer, in the context of the entire trial we are satisfied that such foreclosure did not deprive defendant of his constitutional right to confront the witnesses against him or deny him substantial justice or a fair and impartial trial.

Finally, defendant contends that the state failed to prove beyond a reasonable doubt all of the essential elements of the two offenses with which he was charged.

First, he argues that the evidence produced at the trial by the State failed to overcome evidence offered by the defendant which presented an innocent explanation for his presence and activities on the evening in question.

Although defendant presented an alternate and contradictory version of the evening's events, it is well established that the testimony of a single witness, provided that the witness is credible and observed the accused under conditions which would allow a positive identification to be made, is sufficient to support a conviction, notwithstanding the fact that his testimony is contradicted by that of the accused. *People* v. *Stringer* (1972), 52 Ill. 2d 564, 569; *People* v. *Gates* (1977), 47 Ill. App. 3d 109, 114.

In contrast to the testimony presented by the investigating officer, defendant's testimony appears highly improbable and may have been rejected by the jury as unworthy of belief. A defendant who explains his presence at the scene of a crime must articulate a reasonable or believable story or be judged by its unreasonableness or improbabilities. (*People* v. *Davis* (1977), 54 Ill. App. 3d 517, 524; *People* v. *Harter* (1967), 86 Ill. App. 2d 461, 471; *People* v. *Booher* (1966), 73 Ill. App. 2d 226, 229.) In order to give credence to defendant's testimony, the jury would necessarily have been forced to conclude that the officer deliberately lied on the stand in order to secure a conviction. Since there is no evidence in the record to indicate that the officer or any other State's witness had acted out of bad motives, the jury apparently chose to give little credence, if any, to defendant's testimony. The jury may have also determined that the testimony of defense witnesses, Congleton and McCormick, regarding the presence of a third man on the evening in question, did not contradict or seriously impugn the credibility of the

investigating officer. It is clear in Illinois that it is the responsibility of the trier of fact

> "* * * to determine the credibility of the witnesses, the weight to be given their testimony and the inferences to be drawn from the evidence. [Citation.] Where the evidence is merely conflicting a court of review will not substitute its judgment for that of the trier of fact. [Citation.]" *People* v. *Akis* (1976), 63 Ill. 2d 296, 298-299.

Nor do we choose to do so in this case.

Next the defendant argues that the State did not prove the essential element of ownership of the 1975 Monte Carlo beyond a reasonable doubt and thus failed to prove a material part of its case under the Illinois theft statute. Ill. Rev. Stat. 1975, ch. 38, par. 16-1(a)(1).

There is no merit in this contention. In this case, there is ample competent evidence from which the jury could have found that the defendant was caught in the act of stealing an automobile and that the owner of the vehicle appeared at the scene and recognized his car, which was in the custody of the police and remained impounded until the owner retrieved it. The inconsistencies in the testimony of the police officers and Mr. Panoch regarding the color of the car do not constitute a sufficient basis for disturbing the finding of the jury.

We find that the essential elements of the offenses with which the defendant was charged were proved beyond a reasonable doubt.

The judgment of the circuit court of DuPage County is accordingly affirmed.

AFFIRMED.

SEIDENFELD, P.J. and WOODWARD, J., concur.

APPENDIX B

53468

ILLINOIS SUPREME COURT
CLELL L. WOODS, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

September 29, 1980

Mr. Jeffrey B. Steinback
Attorney at Law
134 N. LaSalle St., S#300
Chicago, IL 60602

No. 53468—People State of Illinois, respondent, vs. Gerald H. Scarpelli, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

No. 80-876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GERALD H. SCARPELLI,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REVIEW OF THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT, NO. 79-501

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Printed by the Authority of the State of Illinois—1-81-40

QUESTION PRESENTED FOR REVIEW

Whether the restriction of cross-examination of the arresting officer as to petitioner's height or to pre-trial preparation was harmless beyond a reasonable doubt where the identification of petitioner was not in issue at trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GERALD H. SCARPELLI,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REVIEW OF THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT, NO. 79-501

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, affirming petitioner's conviction is submitted to this Court as an exhibit to the Petition for Writ of Certiorari and, therefore, is not contained in this brief in opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Illinois Appellate Court opinion adequately sets forth the relevant facts.

REASON FOR DENYING THE WRIT OF CERTIORARI

THE IDENTIFICATION OF THE PETITIONER WAS NOT IN ISSUE AT TRIAL; THEREFORE, THE RESTRICTION OF CROSS-EXAMINATION OF THE ARRESTING OFFICER AS TO PETITIONER'S HEIGHT OR TO PRETRIAL PREPARATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner alleges his sixth amendment right to confrontation was violated by the trial court's improper restriction of cross-examination of Officer Culen. Specifically, petitioner cites to the record where the trial court restricted his inquiry into Officer Culen's pretrial preparation and his recollection regarding the height of the person he saw enter the Monte Carlo, the car that petitioner was charged with stealing.

The Illinois Appellate Court for the Second Judicial District correctly determined that any error in restriction of cross-examination by the trial court was harmless because no reasonable doubt existed that the exclusion of this testimony could have contributed to the petitioner's conviction. The Illinois Appellate Court found the following facts had been testified to by Officer Culen, a Willowbrook police officer. Officer Culen was engaged in the stakeout of a bowling alley parking lot where numerous car thefts had occurred. The night was clear and he had an unobstructed view of the parking lot which was illuminated by large vapor lights. He observed a vehicle enter the parking lot, drive slowly up and down several aisles, pass a number of empty parking spaces, and stop at the end of an aisle close to Officer Culen's location. He saw two people get out of the car and clean the windshield or lights and return to the car. One emerged carrying a small black bag pressed against his stomach and walked down the row to a 1975 Chevrolet Monte Carlo located under one of the lot's vapor lights. Officer Culen started his car and observed the person enter the Monte Carlo on the driver's side; no other pedestrians were in the lot at that

time. Officer Culen drove up behind the Monte Carlo and parked as the Monte Carlo started to back out of the space. Immediately, Officer Culen got out of his car and approached the person who was still in the car and called out, "Police officer, freeze or halt!" Officer Culen was about 15 feet away from the man at that point and observed him run from the car to the west. In pursuit Officer Culen kept him within his sight and within a distance of 20 feet until he was apprehended.

In holding that the exclusion of inquiry into pre-trial preparation of Officer Culen and of inquiry into his description of the petitioner's height at the preliminary hearing was harmless error, the Illinois court stated that this was not a case where the defendant was apprehended some time later on the basis of a description based on clothing, height, and size. That is, the credibility of Officer Culen's testimony did not depend on his ability to observe the defendant, the number of vehicles in the parking lot, the color of the car, etc., for the petitioner does not deny he was present in the parking lot that evening or that he was the one pursued by Officer Culen and apprehended. Indeed, petitioner could hardly deny this.

Petitioner's defense consisted of claiming that Officer Culen was deliberately lying, not merely claiming that the officer could have been mistaken that the petitioner was inside rather than outside the Monte Carlo before he fled from the parking lot. Petitioner testified that he was in the parking lot on his way to the bowling alley for a drink when he noticed a man slumped over the wheel in a car with its lights on. When he approached the car, he saw a man (Officer Culen) standing by the driver's side and pointing a gun at him whereupon petitioner ran out of fear for his life. Petitioner presented the testimony of three witnesses to corroborate his story. Karen Garcia testified she dropped the petitioner off at the bowling alley so that he could have something to drink while she shopped at a nearby store. William Congleton and Linda McCormick testified that they saw two men run away from the parking lot while a third man exited the Monte Carlo and ran in the opposite direction of the other two. Therefore, Officer Culen's credibility did not depend

on whether or not he could see whether there were two men in the Monte Carlo. Petitioner does not claim that the officer could have been mistaken as to whether the petitioner was inside or outside the car. Therefore, either Officer Culen was telling the truth or he was lying when he stated the man he chased was first inside the Monte Carlo. Petitioner does not deny that the man pursued by Officer Culen and apprehended was he. Therefore, the jury had to choose between two conflicting stories; they chose to believe Officer Culen's testimony that the petitioner got into the Monte Carlo, not the petitioner's story that he was an innocent bystander. To believe petitioner's version of the facts, the jury would have to believe that Officer Culen would abandon a suspect whom he had covered with a gun and whom he suspected of theft in order to give chase to a man who happened to walk innocently upon the scene. As the Illinois Appellate Court stated, in order to believe defendant's testimony the jury would necessarily have been forced to conclude that Officer Culen deliberately lied on the stand in order to secure a conviction.

Therefore, in light of the evidence presented at trial, the alleged improper restriction of cross-examination of Officer Culen was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Petitioner alleges that Officer Culen stated at the preliminary hearing that the suspect's height was between five feet, six inches tall and five feet, ten inches tall, whereas at trial he testified the defendant was no taller than five feet, nine inches tall; at best this represents a one-inch discrepancy.

However, any restriction of cross-examination as to any discrepancy in height in Officer Culen's description of the petitioner must certainly be harmless, as the petitioner did not deny that he was the man pursued by Officer Culen in the parking lot that evening or that Officer Culen could have been mistaken as to the fugitive's presence in the Monte Carlo. The other specific allegation of restriction of cross-examination dealt with the pretrial preparation of Officer Culen as to whether he

had conversed with the State's Attorney. Such evidence certainly could not have influenced the jury's verdict in light of the undisputed identification of the petitioner and because the petitioner's defense challenged Officer Culen's veracity, not merely his credibility.

The case of *Allison* v. *Gray,* 603 F. 2d 633 (7th Cir. 1979), relied on by petitioner, is not on point, for there the defendant was precluded from presenting alibi witnesses and the court was unable to apply the test of harmless error because there was no indication in the record of what the alibi evidence was. However, in the instant case, the petitioner was able to present his defense to the jury. In *Allison* the court reasoned that the alibi might be a complete defense to the crime charged. By contrast, in the instant case, whether or not the officer had discussed his testimony with the State's Attorney or given a more vague description of the petitioner's height could in no way present an absolute defense to the crime charged.

Furthermore, the cases relied on by petitioner, where this Court held that the petitioner's sixth amendment right to confrontation was violated, concern facts where a traditional area of cross-examination was completely denied to the defense. In *Smith* v. *Illinois,* 390 U. S. 129, 89 S. Ct. 748, 19 L. Ed. 2d 956 (1968), the defense was precluded from asking the witness's correct name and address after the witness admitted that the name he had given was false. This Court relied on *Alford* v. *United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931), which also reversed because the defense could not ask the address of a prosecution witness who happened to be in the custody of federal authorities. In *Alford* the Court noted the defense had been denied the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test. Also in *Davis* v. *Alaska,* 415 U. S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the defense was denied the opportunity to cross-examine as to the juvenile record of a crucial prosecution witness for the purpose of showing bias. Furthermore, *Brookhart* v. *Janis,* 384 U. S. 1, 86 S. Ct. 1245, 16

L. Ed. 2d 314 (1966) is certainly distinguishable, for there the defendant was completely denied the right to cross-examine the witnesses who testified against him. Finally, in *United States* v. *Jackson,* 482 F. 2d 1167 (10th Cir. 1973), *reh. denied,* (1973), *cert. denied,* 414 U. S. 1159 (1973), the opinion actually supports respondent's position, for there the court held that the alleged restriction of cross-examination was not reversible error because the defense had not been completely denied access to an area which was properly the subject of cross-examination.

Likewise, in the instant case, petitioner does not claim he was completely denied cross-examination into proper areas. His allegations, as in *Jackson,* concern the extent of cross-examination into several areas. (See Petition, p. 7) In these allegations the petitioner fails to claim a total absence of cross-examination but rather complains of the extent of the cross-examination which petitioner fails to show was prejudicial as in *Jackson.*

Furthermore, in *United States* v. *Hill,* 589 F. 2d 1344 (8th Cir. 1979), the restriction of cross-examination that concerned matters that were repetitive, irrelevant, or immaterial did not prejudice the defendant. In the instant case, the number of cars in the parking lot, the position of the individual in the car, the color of the Monte Carlo, e.g., do not concern relevant matters to impeach Officer Culen's testimony. The petitioner would have had to show that Officer Culen was practically blind before his testimony could be impeached that the man he chased got out of the Monte Carlo.

Petitioner has failed to show that he was prejudiced by the restriction of cross-examination which was irrelevant, immaterial, and repetitious. Furthermore, because the petitioner's defense consisted of attempting to show Officer Culen deliberately lied and not that he was mistaken as to petitioner's presence in the Monte Carlo, Officer Culen's pretrial preparation or prior description of the petitioner's height, which at most conflicted with his trial testimony by one inch, beyond a reasonable doubt could not have influenced the jury's verdict.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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